88-1468

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

DONALD V. JOHNSTONE, *Petitioner,*

v.

AMOCO OIL COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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March 6, 1989

QUESTIONS PRESENTED

1. Has the United States Court of Appeals for the Seventh Circuit improperly established a precedent in this case which effectively repeals or modifies the burden of proof requirements under the Petroleum Marketing Practices Act (15 U.S.C. Sec.2805(c)) and which is in direct conflict with the Tenth Circuit's and the Eleventh Circuit's interpretations of the Act?

2. Is the decision of the United States Court of Appeals for the Seventh Circuit so clearly erroneous for failing to consider 15 U.S.C. Sec. 2805(e) in upholding the application of the issue preclusion doctrine that reversal by this Honorable Court is warranted?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Donald V. Johnstone, and the Respondent, Amoco Oil Company. Respondent, Amoco Oil Company, is not known to have any parent companies or partially owned subsidiaries to list pursuant to Rule 28.1.

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[**Ed. Note:** This Petition is accompanied by a seperately bound Appendix which contains its own Table of Contents.]

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IN THE SUPREME COURT OF THE UNITED STATES

January Term, 1989

DONALD V. JOHNSTONE, Petitioner,

v.

AMOCO OIL COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The petitioner Donald V. Johnstone respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on September 14, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as Amoco Oil Company v. Johnstone, 856 F.2d 967 (7th Cir., 1988), and is reprinted in the appendix hereto,

p. 1a, infra.

The memorandum decision of the United States District Court for the Southern District of Indiana (Noland, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 19a, infra.

JURISDICTION

Amoco Oil Company brought this suit against Donald V. Johnstone for ejectment in the United States District Court for the Southern District of Indiana. The jurisdictional basis for that claim was the diversity of the citizenship of the parties and an amount in controvery in excess of $10,000, pursuant to 28 U.S.C. Sec. 1332. The District Court's jurisdiction was also founded upon the Declaratory Judgment Act, 28 U.S.C. Sec. 2201-02, and under 15 U.S.C. 2801, et seq. Judgment was rendered by the District Court and an appeal was taken by the petitioner to the Court of Appeals for the Seventh Circuit.

On September 14, 1988, the Seventh Circuit affirmed the decision of the District Court. A Petition for Rehearing was filed by the petitioner and was denied on December 7, 1988.

The jurisdiction of this Court to review the decision of the Seventh Circuit is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

Selected, pertinent sections of 15 U.S.C. Sec. 2801, et seq. **Petroleum Marketing Practices Act** are presented herein as follows:

§ 2802. Franchise relationship

General prohibition against termination or nonrenewal

(a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may --

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date

on which the relevant franchise was entered into or renewed).

Precondition and grounds for termination or nonrenewal

* * *

(b)(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

* * *

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if --

(i) such determination is --

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable

changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either --

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

* * *

§2804. Notification of termination or nonrenewal of franchise relationship

General requirements applicable to franchisor

(a) Prior to termination of any franchise or nonrenewal of any franchise relationship,

the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship --

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

* * *

Manner and form of notification

(c) Notification under this section --

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain --

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

* * *

§ 2805. Enforcement provisions

Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

(a) If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of --

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(b) (1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

* * *

Burden of proof; burden of going forward with evidence

(c) In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(d)(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled --

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(e)(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that --

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business --

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located; or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been compiled with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

(Pub.L. 95-297, Title I, § 105, June 19, 1978, 92 Stat. 331.)

STATEMENT OF THE CASE

Johnstone has been an Amoco service station dealer for approximately seventeen years. Until 1987 he had operated two Amoco service stations in Indianapolis. One of the stations was referred to as the "Nora Station", and the other as the "Belle Meade Station". Presently, Johnstone operates only the Belle Meade Station since his operation of the Nora Station was terminated pursuant to the decision in this case below. During all times relevant to this case, the real estate upon which the stations were located were owned by third parties. Amoco owned the improvements on those properties and leased the premises in turn to Johnstone.

In 1984 Johnstone commenced an action against Amoco unrelated to the case at bar seeking a declaratory judgment that a provision of a rider to the Dealer Supply Agreement between the parties known as the Meter

Marketing Plan ("MMP") Rider was violative of the Indiana Deceptive Franchise Practices Act which prohibits contract provisions that allow for a subtantial, unilateral modification of a franchise agreement without the consent of the franchisee. The action was commenced by Johnstone in state court but was removed to federal court by Amoco. **That action did not involve any issues relating to the federal statute known as the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. 2801, et seq.**

While the MMP case was pending, Amoco gave notice to Johnstone of its intention to terminate or nonrenew its lease and other related agreements for the Nora Station. The notice given was pursuant to the notice requirements of the PMPA. Amoco also gave Johnstone an offer to sell its interests in the premises to him. Such an offer was required by the terms of the PMPA (Sec. 2802(b)(3)(D)(iii)). Johnstone and his counsel

commenced negotiations with Amoco at that point concerning the terms of the offer.

The negotiations between the parties for the sale of Amoco's interests continued, but on May 19, 1986, Amoco filed this action below seeking the ejectment of Johnstone from the premises. Three days later, on May 22, 1986, trial was conducted in the MMP case. (Johnstone had not been served with this lawsuit until well after the MMP trial had concluded.) On March 18, 1987, the Honorable S. Hugh Dillin, who heard the MMP case, issued a judgment in Amoco's favor. That judgment was accompanied by his Findings of Fact and Conclusions of Law. See p. 39a, infra.

The MMP judgment is relevant to this case in two respects:

(1) The findings of fact included findings that the terms of the Dealer Supply Agreement and its related lease and riders

(collectively referred to as the "franchise agreement") had "terminated" for the Nora Station, and that Amoco had given notice of its intention not to renew the franchise agreement for the Nora Station "in accordance with the provisions of the [PMPA]"; and

(2) The conclusions of law included a conclusion that "All issues involving the validity of the [MMP provisions] for the Nora Station are moot."

Following the filing of the complaint in this case by Amoco, Johnstone filed a Counterclaim alleging (1) that Amoco had not complied with the PMPA in not renewing Johnstone's Nora Station franchise, and (2) that he was entitled to specific performance of a contract he claimed was formed between the parties for the sale, by Amoco, of its interests in the Nora Station. On the day of trial in this case Amoco moved the District Court to preclude from the trial any

consideration of issues relating to compliance by Amoco with the PMPA. The Honorable James E. Noland held that the doctrine of issue preclusion estopped the re-litigation of any PMPA issues. See p. 19a, infra. The trial continued on the only remaining issue and judgment was entered in Amoco's favor. The District Court's judgment in this case was accompanied by a Memorandum Decision. See p. 19a, infra.

In due course, the petitioner took his appeal to the Seventh Circuit on the issue of whether the District Court improperly precluded the trial on the PMPA issues. Johnstone argued on appeal that the District Court had improperly applied the issue preclusion doctrine, and complained that because of the District Court's ruling, he never had his day in court despite the intent of the PMPA, which has been referred to as the "Dealer Day in Court" bill. (Cong. Record, May 5, 1978,

p.s.12761-62 (Statement of Senator John Durkin).)

The Seventh Circuit addressed the issue preclusion doctrine and, like the District Court, rejected Johnstone's argument that that doctrine was improperly applied.

REASONS FOR GRANTING THE WRIT

I.

The decision below upholding the District Court's application of the issue preclusion doctrine, despite the clear provisions in the Petroleum Marketing Practices Act respecting a franchisor's burden of proof, significantly hinders the effective administration and enforcement of the Act, undermines the Act's remedial intent, and establishes precedent which conflicts with the Act and with other Circuits which have considered that portion of the Act.

The Petroleum Marketing Practices Act, 15 U.S.C. 2801 et seq. ("PMPA") is a remedial statute enacted into law in 1978, the purpose of which is "...aimed at halting the steady decline in the number of small businessmen who can continue to compete in the retail gasoline

marketplace." [Cong. Record, May 5, 1978, p.s. 12761-62 (Statement of Senator John Durkin).] The PMPA has not once been the subject of a case heard by the United States Supreme Court. This instant case presents issues which have been erroneously resolved by the Seventh Circuit Court of Appeals in such a way as to have substantially weakened the efficacy of the PMPA and thus rendered significant parts of it ineffective without a valid judicial determination of any issue concerning its constitutionality.

In the case below, the District Court precluded from consideration at trial Johnstone's claims that his termination as a dealer at the Nora Station was improper under the terms of the PMPA. The District Court ruled that all claims relating to the PMPA were precluded by a finding made in the MMP case. In applying the doctrine of "issue preclusion" (otherwise referred to as collateral estoppel)

the District Court failed to carry out the remedial provisions of PMPA. Moreover, the affirmation of the District Court decision by the Seventh Circuit has, in this particular case and through its precedential effect in all future PMPA cases, voided certain aspects of the PMPA; namely, the defined burden and adequacy of proof imposed upon the franchisor -- proof which is not so much an evidentiary standard as it is a part of the substantive remedy which PMPA does provide and was intended to provide.

In order to best understand the significance of this case on the PMPA, a brief review of the Act and its purpose is i order. No one can dispute that the purpose of the PMPA was to protect service station dealers, jobbers, and other "franchisees" from "arbitrary or discriminatory termination or non-renewal of their franchises" by the much larger oil companies ("franchisors").

S.Rep.No. 95-731, 95th Cong., 2d Sess. 15, reprinted in [1978] U.S. Code Cong. & Ad. News 873, 874 ("Senate Report"). The PMPA generally prohibits the termination or nonrenewal of franchise agreements between petroleum franchisors and franchisees. The Act then carves out certain exceptions to the general rule and sets forth conditions for an effective termination or nonrenewal. Strict compliance with these conditions and exceptions is required or else termination or nonrenewal is ineffective and can subject the franchisor to injunctive relief and/or other equitable and legal remedies.

Section 2802 of the PMPA identifies the acceptable grounds for termination and nonrenewal of a franchise agreement, and Section 2804 sets forth the notice requirements which must be followed by a franchisor if the termination or nonrenewal is to be effective. While restricting the general contractual

relationship which existed between oil companies and dealers before PMPA was enacted, the Act nevertheless preserves the flexibility of franchisors to make bona fide business decisions respecting its franchises.

> "The statutory scheme of the PMPA seeks to strike a balance between the interests of the participants in a petroleum marketing franchise relationship. Congress recognized the disparity of bargaining power between franchisor and franchisee and the harsh consequences of suddenly terminating a business for which the franchisee has worked long and hard to develop goodwill. See 123 Cong.Rec. 10386 (1977) (remarks of Rep. Mikva). Echoing those concerns, the PMPA commits gasoline franchisors to a franchise marriage of sorts, the dissolution of which is available only on specific grounds. While most of the grounds relate to serious franchisee misconduct, others reflect an intent to permit the franchisor to exercise reasonable business judgment.
>
> * * *
>
> As the statutory scheme shows, 'the grounds specified as justification for termination or nonrenewal of a franchise are intentionally broad enough to provide franchisors the flexibility which may be needed to respond to changing market conditions or consumer preferences,' id. at 10383 (remarks of Rep. Dingell), yet

> are not 'so broad as to deny franchisees meaningful protections from arbitrary or discriminatory terminations and nonrenewals or to prevent fulfillment of the reasonable renewal exceptions of franchisees,' Senate Report at 18, U.S. Code Cong. & Ad. News at 877."

Brach v. Amoco Oil Company, 677 F.2d 1213 (7th Cir., 1982).

It was not mere happenstance that the PMPA specifies in plain terms the allocation of proof burdens in a PMPA case. Section 2805(c) of the Act provides that once the franchisee has proven that a termination or nonrenewal has occurred, the burden of proof shifts to the franchisor to show that proper notice has been given to the franchisee and that the grounds for termination or nonrenewal are permissible under PMPA. Indeed, the authors of the PMPA made it clear that the provisions placing the burden of proof on the shoulders of franchisors was a key tool to carry out the remedial intent of PMPA to protect franchisees; a major concern of Congress was the disparity of litigation

resources between a local gasoline retailer on the one hand, and a giant international oil company on the other.

The PMPA's primary author and floor manager was Representative John Dingell. Upon bringing PMPA to the floor of the House of Representatives, he stated:

> "I believe that several important matters regarding this legislation should be appreciated. First, the grounds specified as justification for termination or nonrenewal of a franchise are intentionally broad enough to provide to franchisors the flexibility which may be needed to respond to changing market conditions or consumer preferences. However, to assure that franchisees nevertheless receive the meaningful protections which this Federal legislation is intended to provide and to assure that this flexibility does not frustrate the purposes of this legislation, the bill utilizes very special enforcement mechanisms. The burden of proof is placed upon the franchisor to prove compliance with the requirements of the legislation. In addition, because the franchisee's rights must be preserved, pending litigation, if his ultimate victory is to be meaningful, preliminary injunctive relief is made available to the franchisee as a matter of right upon a minimal showing.

> The key to this legislation is the balance which is struck by including flexibility in the grounds which justify termination or nonrenewal and simultaneously requiring that the franchisor prove to an impartial arbiter, a Federal court judge, that permissible grounds for termination or nonrenewal do in fact exist. Franchisee rights under this bill are, as a result, more meaningful than limitations on franchisor conduct, provided in some State laws, which are arguably more stringent. The theoretical protections afforded by these State laws are often not enforceable in practice, due to the procedural advantages enjoyed by the franchisor."

123 Cong. Rec. p. H20383 (4/5/77).

Since PMPA pointedly changes the burden of proof from what would otherwise exist, it met with predictable resistance from the major oil companies during Congressional debate on the bill. In fact, Amoco itself complained that,

> "[The PMPA] shifts the burden of proof in lawsuits to the refiners and distributors who are being sued. This departs from basic judicial practice, where plaintiffs must bear the burden of proof. It is a touch of partnership which accentuates the bill's lack of balance."

[Hearings Before the Subcommittee on Energy and

Power of the Committee on Interstate and Foreign Commerce, on HR 130, Petroleum Marketing Practices Act, Serial No. 95-51 (9th Cong., 1st Session, at p. 346)].

Obviously, then, the burden of proof provisions of the PMPA cannot be taken lightly or ignored by the courts. To do so is to undermine and render void an important remedial function of that legislation. "As remedial legislation, the Act must be given a liberal construction consistent with its overriding purpose to protect franchisees. See, United States v. Bacto - Unidisk, 394 U.S. 784, 798, 89 S.Ct. 1410, 1418, 22 L.Ed.2d 776 (1969); [other citation omitted.]" Brach, at 1221.

In the instant case the PMPA burden of proof provisions have been assaulted by Amoco, using the doctrine of issue preclusion as the weapon of choice. The District Court and the Seventh Circuit Court of Appeals have both condoned this assault by their rulings, and the

precedential effect of those rulings will judicially modify the standards clearly set forth by Congress.

These findings of fact and conclusions of law in the MMP case, by themselves, form the basis for the District Court's finding in the present case that the issue preclusion doctrine prevented the litigation of any issues relating to Amoco's compliance with the PMPA:

> **"Findings of Fact**
>
> * * *
>
> 2. The [Dealer Supply Agreement] and MMP for the Nora Station expired pursuant to the terms of the agreements on February 28, 1986.
>
> 3. By letter dated November 15, 1985, Amoco gave Johnstone notice of its intention to terminate or nonrenew the parties' relationship with respect to the operation of the Nora Station in accordance with the provisions of the [PMPA]." (p. 40a, infra); and
>
> * * *
>
> **"Conclusions of Law**
>
> 1. All issues involving the validity of the provisions of the [MMP]

Rider for the Nora Station are moot." (p. 44a, infra)

Apart from the clearly erroneous decision by the Seventh Circuit -- a point that will be discussed further below -- the Seventh Circuit has either ignored or misinterpreted the PMPA provisions requiring Amoco to carry the burden of proof to show that it had complied in all respects with the PMPA.

Section 2805(c) of the PMPA states,

> "The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title."

This requires, therefore, that Amoco prove that:

(1) It had proper grounds for the termination and nonrenewal of Johnstone's franchise (See 2802(b)(1)(B)); meaning that the grounds alleged in its letter of termination or nonrenewal to Johnstone -- namely, that Amoco

determined renewal was likely to be uneconomical to Amoco despite any reasonable changes or additions (§2802(b)(3)(D)(i)(IV)) -- were bona fide grounds founded in fact;

(2) It did not make the determination referred to above for purposes of converting the premises to a company-operated station (§2802(b)(3)(D)(ii));

(3) Since the Nora Station involved leased marketing premises, it made a bona fide offer to Johnstone to sell, transfer, or assign its interests in those premises. (§2802(b)(3)(D)(iii)); and

(4) It gave proper notice to Johnstone as required by §2804.

Amoco did not prove any of these elements with the exception, perhaps, of the fourth. Amoco contended, Johnstone conceded, and the District Court in the MMP case found that "[b]y letter dated November 15, 1985, Amoco gave Johnstone notice of its intention to terminate

or nonrenew the parties' relationship with respect to the operation of the Nora Station in accordance with the provisions of the [PMPA]." [emphasis added.] (p. 40a, infra.)

Yet, the Seventh Circuit found that, despite the proof requirements imposed by the PMPA, the doctrine of issue preclusion controlled and that the findings and conclusion of the District Court in the prior MMP case must be construed as a determination that this extensive proof requirement had been met. In effect, the decision of the Seventh Circuit has held that it is not necessary for there to be specific findings on each element of proof required of the franchisor.

In the Seventh Circuit decision below the Court disposed of this glaring contradiction between the PMPA proof requirements and its application of the issue preclusion doctrine thusly:

"Johnstone then argues that the findings

were not enough because '[n]o finding of fact was made with regard to any factual issue necessary to determine if the notice of termination or nonrenewal was upon proper grounds or whether Amoco's offer to sell its interests in the premises to Johnstone was a 'bona fide offer' as required by he [sic] PMPA.'

"In Frye [v. United Steelworkers of America, 767 F.2d 1216 (7th Cir.), cert. denied, 474 U.S. 1007 (1985)], we considered an analogous situation and stated that [e]ven if there were other facts that could have been presented at [trial] the fact that they were not brought to the [court's] attention would not argue against application of collateral estoppel, as long as there had been an equal incentive to litigate the issue, and if there were no other factors making estoppel unjust.
767 F.2d at 1222.

"It must be remembered that in the first suit between these parties Johnstone sued Amoco, seeking to reform certain aspects of their franchise arrangements. When the Nora Station lease expired by its own terms and bargaining in accordance with the PMPA produced no contract of sale, the Nora Station reverted to Amoco, and the controversy was over. Johnstone had no further legal interest in the Nora Station, and it would therefore be futile to try to reform a franchise that was no longer in existence. If Johnstone, as he claims, had valid defenses to any termination by Amoco the first case provided him with the time and place to offer these defenses. The issue of the

> Nora Station franchise's viability was put in issue by Amoco. The court then found the station's status had been resolved and all was moot. There was little more that Judge Dillin could say about the matter if the defendant held back and did not deny mootness nor offer any of the defenses he now claims to have had to demonstrate that the case was not moot because the PMPA had not been properly compiled with by Amoco.
>
> "It was up to Johnstone either to show why his claim was not moot or suffer the loss of that part of his own lawsuit as to the Nora Station."

See p. 11a, infra.

It is clear that the Seventh Circuit either ignored the proof required of Amoco, or else has determined to judicially modify those requirements and dilute the duty placed on franchisors in PMPA cases. The Seventh Circuit talks of Johnstone's failure to prove his PMPA "defenses" in the MMP case when the PMPA in fact requires just the opposite: that Amoco, as franchisor, prove its compliance. In one breath the Seventh Circuit has effectively altered the level of protection intended by Congress to be accorded by PMPA. Moreover, the

opinion directly conflicts with two opinions in other Circuits which have enforced the clear language of the PMPA and has required that franchisors carry the burden of proving that they have complied with the PMPA.

In Clinkscales v. Chevron U.S.A., Inc., 831 F.2d 1565 (11th Cir. 1987), the Eleventh Circuit considered a franchisee's claims under the PMPA. The franchisee had received notice of termination from the franchisor which set forth several grounds for the termination under the PMPA. The franchisee sought injunctive relief and damages. The district court in that case denied the franchisee's motion for summary judgment, but granted the franchisor's summary judgment motion on the PMPA. The Eleventh Circuit found that the district court had misapplied the standards for summary judgment set forth in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), which discusses the traditional burden of proof

requirements which a plaintiff must meet in order to avoid the entry of summary judgment against him. The Eleventh Circuit held that the the district court overlooked the burden of proof requirements set forth in the PMPA.

> "Clinkscales met his burden of production by demonstrating that Chevron terminated the franchise agreement. The burden then shifted to Chevron to demonstrate that the termination was valid under the PMPA. The district court erred in concluding that Chevron was not required to make this showing.
>
> "The Court's opinion in Celotex is consistent with the burden of proof for summary judgment under the PMPA. The Court in Celotex held that Rule 56(c) mandates the entry of summary judgment, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, **and on which that party will bear the burden of proof at trial.**' 106 S.Ct. at 2552-53 (emphasis added). ...[T]o prevail on its own motion for summary judgment, Chevron had to demonstrate that the termination was lawful under the PMPA."

831 F.2d at 1569.

It is obvious, then, that the Eleventh Circuit has upheld the application of the

burden of proof requirements of the PMPA while the Seventh Circuit in this case has not.

The Tenth Circuit has also spoken on the PMPA burden of proof provisions. In Ewing v. Amoco Oil Company, 823 F.2d 1432, at 1436 (Tenth Cir., 1987), the court considered a case in which a franchisee sought a preliminary injunction against a franchisor which had given him notice of termination pursuant to the PMPA. The district court granted the injunction and the Tenth Circuit upheld that decision, stating in response to Amoco's arguments on appeal that, "...in any PMPA action, including an action for an injunction, the franchisor bears the burden of establishing its compliance with the statute." Id., at 1436.

The Seventh Circuit's opinion below has set a confusing precedent which is likely to generate even further confusion within the Seventh Circuit and among the other Circuits.

It is precedent which is clearly at odds with the clear intent of Congress found in the PMPA, and with the interpretations of the PMPA found in the Tenth and Eleventh Circuits. Consequently, review by this Court is essential.

II.

The decision below is so clearly erroneous in light of 15 U.S.C. Sec. 2805(e) that a review of the decision is warranted.

The Seventh Circuit's decision affirmed the District Court's application of the issue preclusion doctrine when it is plain that given the strictures Sec. 2805(e) of the PMPA places upon courts dealing with PMPA cases, the prerequisite elements of the issue preclusion doctrine could not be fulfilled. This is so even assuming, arguendo, that the prior findings and conclusions in the MMP case included a ruling on any PMPA issues.

Section 2805(e) of the PMPA states:

"(e)(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, **the court may not compel a continuation or renewal of the franchise relationship** if the franchisor demonstrates to the satisfaction of the court that --

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business--

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by

> section 2802 of this title." [emphasis added.]

Amoco based its nonrenewal of Johnstone's Nora Station franchise on the grounds provided for at Section 2802(b)(3)(D)(i)(IV) -- that renewal of the franchise relationship would be uneconomical, etc. Thus, assuming that the propriety of Amoco's nonrenwal of Johnstone was adjudicated in the MMP case as was so held by the Seventh Circuit, then there must have been a showing that, indeed, the renewal of the franchise relationship would be uneconomical to Amoco. Consequently, that section of the PMPA quoted above provides that the District Court in the MMP case could not have compelled a continuation of the franchise, and therefore the issues relating to the MMP Rider in that case were indeed moot.

But the PMPA has requirements that go beyond mere approval or disapproval of certain grounds for termination or nonrenewal of a

petroleum franchise. Even if there are proper grounds for such termination or nonrenewal, in some cases there are other requirements that the franchisor must comply with under the PMPA. This explains, therefore, the purpose behind Section 2805(e) quoted above, and why subsection (2) above provides that if there is a showing of proper grounds, then the court may not compel a continuation of the franchise, but that a franchisee may still seek actual damages if there has been any other aspect of the PMPA which has been violated. For example, if a nonrenewal is based on one of the grounds enumerated in Section 2805 above, but the franchisee was not given proper notice under Section 2804, then, nevertheless, the nonrenewal is prohibited. Section 2805(e), though, limits the franchisee's remedies in those instances to actual damages, and not court-ordered continuation of the franchise.

In this particular case, Amoco was also required to present Johnstone with a bona fide offer to sell its interests in the premises as a precondition to an allowable nonrenewal. (15 U.S.C. 2802(b)(3)(D)(iii).) However, if Amoco did not do so (as Johnstone argues), then Johnstone's remedies are limited to actual damages -- not a continuation of the franchise relationship. If there could be no continuation of the franchise relationship, then the issues relating to the MMP Rider with respect to the Nora Station were indeed moot as Judge Dillin concluded in that case. That's where the scope of Judge Dillin's conclusions must stop, however, for any further consideration of the PMPA issues in the MMP case would have been utterly irrelevant.

In its opinion, the Seventh Circuit correctly cites its own precedents to define the "generally recognized principles" of collateral estoppel or issue preclusion:

"In County of Cook v. Midcon Corp., we set forth the generally recognized principles:

> In general, collateral estoppel precludes relitigation of issues in a subsequent proceeding when (1) the party against whom the estoppel is asserted was a party to the prior adjudication, (2) the issues which form the basis of the estoppel were actually litigated and decided on the merits in the prior suit, (3) the resolution of the particular issues was necessary to the court's judgment, and (4) those issues are identical to issues raised in the subsequent suit.

773 F.2d 892, 898 (7th Cir. 1985).

* * *

> In Frye v. United Steelworkers of America, 767 F.2d 1216, 1220-21 (7th Cir.), cert. denied, 474 U.S. 1007 (1985), this court elaborated on the use of collateral estoppel, although in the context of administrative agency decisions. We held that an express finding of fact or law in an earlier judgment will have a preclusive effect if that finding was necessary and essential to the earlier judgment."

(p. 8a, infra.)

It is abundantly clear, on its face, that the decision of the Seventh Circuit did not consider the strictures placed upon the scope of Judge Dillin's findings in the MMP case by

Section 2805(e) when it decided to uphold the ruling of preclusion by the lower court.

Please consider this:

(a) the MMP case did not involve any claims under the PMPA, but rather, Judge Dillin ruled that because there was a termination of the franchise relationship pursuant to PMPA, the issues in the MMP case were moot as respecting the Nora Station;

(b) Section 2805(e) of the PMPA did not allow Judge Dillin to compel a continuation of Johnstone's franchise in any event, so indeed, as Judge Dillin ruled, the issues relating to the MMP Rider, which was a part of the franchise agreement, were moot;

(c) The PMPA provided other remedies to Johnstone other than a court-ordered continuation of the franchise (Section 2805(e)(2)) -- remedies which had nothing whatsoever to do with the issues in the MMP case.

It is clear, therefore, that under the Seventh Circuit's own standards for collateral estoppel, any implied findings by Judge Dillin concerning these other remedies belonging to Johnstone were not "necessary" to Judge Dillin's judgment (Midcon and Frye) or "essential" thereto (Frye). Johnstone should have been allowed his day in court on his PMPA claims. He was denied that right by the District Court in this case, and the Seventh Circuit's decision to affirm the District Court.

The Seventh Circuit's decision is so fundamentally wrong on its face that review by this Court is essential to correct the gross injustice. The PMPA is a remedial statute designed to protect individuals just like Johnstone. Not only has Johnstone been denied the remedy provided, he has even been denied his opportunity to have his case heard.

CONCLUSION

For these reasons, the petitioner, Donald V. Johnstone, respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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88-1468

Supreme Court, U.S.
FILED
MAR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

DONALD V. JOHNSTONE, *Petitioner,*

v.

AMOCO OIL COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

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IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 87-2916

AMOCO OIL COMPANY,

Plaintiff-Appellee,

v.

DONALD V. JOHNSTONE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 86 C 642-James E. Noland, Judge.

ARGUED MAY 19, 1988-DECIDED SEPTEMBER 14, 1988

Before Wood, Jr., Kanne, Circuit Judges, and Reynolds, Senior District Judge.*

---

* The Honorable John W. Reynolds, of the Eastern District of Wisconsin, is sitting by designation.

Wood, Jr., Circuit Judge. The only issue is whether or not collateral estoppel, or issue preclusion, is applicable to this second lawsuit between the same parties.[1] In a bench trial the district judge held that it was.

Plaintiff Amoco Oil Company (Amoco) brought this suit seeking declaratory judgment that Amoco, under the Petroleum Marketing Practices Act (PMPA), had properly terminated or nonrenewed a lease with defendant Donald V. Johnstone as lessee of an Amoco station, known as the Nora Station, in Indianapolis, Indiana. Amoco further sought an order that defendant deliver possession of the station to plaintiff.

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[1] The district court found ample jurisdiction to hear the case under the Petroleum Marketing Practices Act, 15 U.S.C §2801-2841 (PMPA); the Declaratory Judgment Act, 28 U.S.C. §2201; and by reason of diversity, 28 U.S.C. §1332.

I. FACTUAL BACKGROUND

Plaintiff Amoco, a marketer of gasoline petroleum products, entered into two leases, and two Dealer Supply Agreements accompanied by Meter Marketing Plan riders (MMP) and other agreements, with defendant Johnstone involving two separate gasoline stations. One set of agreements involved the Nora Station and covered the period March 1, 1983 to February 28, 1986. The other set involved a separate gasoline station known as the Belle Meade Station. The present case involves primarily the Nora Station, and the Belle Meade Station only indirectly.

Prior to the present suit Johnstone, as plaintiff, in October 1984, had filed suit against Amoco as defendant in the same federal district, but before a different judge, Judge Dillin, alleging that certain provisions of the MMP riders attached to the supply agreements with respect to both the Nora Station and the Belle Meade Station violated the Indiana

Deceptive Franchise Practices Act. Johnstone sought to have the court declare those provisions invalid and to reform each of the MMP riders.

In November of 1985, Amoco by letter sought to terminate or nonrenew the lease and franchise relationship with the defendant regarding the Nora Station, effective when the lease expired in February, 1986. That letter, by which Amoco sought to comply with the requirements of the PMPA, stated that the company had determined that to renew the lease would be uneconomical for Amoco despite any reasonable changes in terms that might be acceptable to the defendant, a termination reason recognized under the Act. The letter also contained a Summary of Dealer Rights at Termination and Non-Renewal. In conformance with the Act, Amoco offered to sell the station to Johnstone for a given price and agreed to keep the offer open for ninety days. Offers and counteroffers followed during the original

time provided, and during an extension by Amoco, but did not culminate in a signed sales agreement. Johnstone tendered an earnest money check, but because he did not deliver signed sales documents, Amoco returned the check to him. These negotiations gave rise to Johnstone's unsuccessful contract counterclaim.[2]

The original claim filed by Johnstone against Amoco seeking to reform parts of their leasing arrangements was tried in May, 1986, and thereafter judgment was entered in favor of Amoco. Johnstone appealed, but in May, 1987, voluntarily dismissed his appeal. The proceedings in that case led Judge Noland in

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[2] Another issue before the district court was whether the parties had entered into a contact for the sale of the gas station in question by plaintiff, Amoco Oil Company, to defendant, Donald V. Johnstone. That issue was decided adversely to Johnstone on his counterclaim for specific performance, but he does not raise the issue on appeal.

this, the second case, also to enter judgment for Amoco on the basis of collateral estoppel, or issue preclusion. We must, therefore, examine Judge Dillin's findings and judgment in the first case to determine their effect on the second case.

In the first case Amoco, by amendment, raised its defense that the Dealer Supply Agreement and Meter Marketing Plan rider, which Johnstone, as plaintiff, had attached to his complaint relating to the Nora Station, had by their terms expired on February 28, 1986, prior to trial. Amoco further alleged that prior to that date Amoco had given Johnstone notice of its intent to terminate or nonrenew the leasing arrangements for the Nora Station which included documents by which Amoco proposed to sell the station to Johnstone, in accordance with the provisions of the PMPA. Amoco claimed in the first case that any issues involving the validity of the MMP for the Nora Station were therefore moot.

Judge Dillin agreed with Amoco, finding that the leasing arrangements for the Nora Station had expired, and that Amoco had given Johnstone notice of its intention to terminate or nonrenew the leasing arrangements in accordance with the PMPA.

II. ANALYSIS

In this court Johnstone claims that Judge Dillin's findings in the first case should not collaterally estop him from attempting to prove in defending this suit that Amoco had not in fact terminated its relationship with him in accordance with the PMPA. That issue, he argues, was not mooted by Judge Dillin's findings and order. We need, therefore, to briefly examine the doctrine of collateral estoppel and determine whether it is properly used as a bar in the present case.

Collateral estoppel, or issue preclusion, is not a mysterious doctrine. In essence it says that courts have enough to do without unnecessarily doing things twice, thereby

increasing the change for inconsistent results. In County of Cook v. Midcon Corp., we set forth the generally recognized principals:

> In general, collateral estoppel precludes relitigation of issues in a subsequent proceeding when (1) the party against whom the estoppel is asserted was a party to the prior adjudication, (2) the issues which form the basis of the estoppel were actually litigated and decided on the merits in the prior suit, (3) the resolution of the particular issues was necessary to the court's judgment, and (4) those issues are identical to issues raised in the subsequent suit.

773 F.2d 892, 898 (7th Cir. 1985).

Johnstone calls to our attention Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327-28, 331 (1979), which modifies the first listed criterion so that in some circumstances mutuality of parties is not necessary. In the present case, however, the mutuality of the parties is conceded.

In Frye v. United Steelworkers of America, 767 F.2d 1216, 1220-21 (7th Cir.), cert. denied, 474 U.S. 1007 (1985), this court

elaborated on the use of collateral estoppel, although in the context of administrative agency decisions. We held that an express finding of fact or law in an earlier judgment will have a preclusive effect if that finding was necessary and essential to the earlier judgment. Both parties cite Wickham Contracting Co. v. Board of Educ., 715 F.2d 21,28 (2d Cir. 1983), a case that states the same criteria in negative terms. The imposition of collateral estoppel in Wickham was held to be improper if the relevant factual finding was not critical and essential to the earlier case and therefore offered the parties little incentive to litigate.

The PMPA regulates the relationship between oil companies, such as Amoco, and their franchisees, such as Johnstone. It sets forth the substantive grounds which can justify a nonrenewal or termination of the franchise relationship and prescribes certain procedures and conditions for any termination or

nonrenewal.[3] In general, the oil company must give ninety days' notice of termination or nonrenewal, and extend to the franchisee a bona fide offer to sell during the notice period. Amoco, at least facially, met the substantive and procedural requirements by providing timely notice of termination or nonrenewal as a result of its determination, made in its normal course of business and in good faith, that renewal of the franchise would likely be uneconomical to Amoco, even considering any reasonable changes or additions to the franchise which might be acceptable to Johnstone. Amoco extended an offer to sell, which Johnstone did not accept.

Johnstone argues that the application of collateral estoppel unjustly denies him the opportunity to dispute Amoco's stated grounds for nonrenewal or termination, and the question of whether Amoco's offer to sell was bona fide. It is Johnstone's position that the district

---

[3] 15 U.S.C. § 2802 (b)(3)(D)(i)(IV)

court in the first case did not hear evidence, nor otherwise consider the merits of Amoco's compliance with the PMPA for the Nora Station. Johnstone also argues that the case cannot be construed to suggest such an adjudication. "The findings of fact themselves," Johnstone argues, simply reiterate what is not disputed; that (a) the terms of franchise agreement between Amoco and Johnstone expired by their own terms on February 28, 1986; and (b) Amoco gave notice of its intention to terminate or nonrenew the relationship by way of its letter of November 18, 1985 in the manner required by the PMPA. Johnstone then argues that the findings were not enough because "[n]o finding of fact was made with regard to any factual issue necessary to determine if the notice of termination or nonrenewal was upon proper grounds or whether Amoco's offer to sell its interests in the premises to Johnstone was a "bona fide offer" as required by he [sic] PMPA."

In Frye, we considered an analogous situation and stated that

> [e]ven if there were other facts that could have been presented at [trial] the fact that they were not brought to the [court's] attention would not argue against application of collateral estoppel, as long as there had been an equal incentive to litigate the issue, and if there were no other factors making estoppel unjust.

767 F.2d at 1222.

It must be remembered that in the first suit between these parties Johnstone sued Amoco, seeking to reform certain aspects of their franchise arrangements. When the Nora Station lease expired by its own terms and bargaining in accordance with the PMPA produced no contract of sale, the Nora Station reverted to Amoco, and the controversy was over. Johnstone had no further legal interest in the Nora Station, and it would therefore be futile to try to reform a franchise that was no longer in existence. If Johnstone, as he claims, had valid defenses to any termination by Amoco the

first case provided him with the time and place to offer those defenses. The issue of the Nora Station franchise's viability was put in issue by Amoco. The court then found the station's status had been resolved and all was moot. There was little more that Judge Dillin could say about the matter if the defendant held back and did not deny mootness nor offer any of the defenses he now claims to have had to demonstrate that the case was not moot because the PMPA had not been properly complied with by Amoco.

It was up to Johnstone either to show why his claim was not moot or suffer the loss of that part of his own lawsuit as to the Nora Station. If he had for some reason been prevented from making his defense in that trial court he could have raised that issue on appeal. He did neither and voluntarily dismissed his appeal. We cannot now retry that part of Johnstone's first lawsuit in this second suit of Amoco. It appears that

Johnstone may have misperceived what was happening in the first suit and what its effect could be, but it should have been obvious. If Johnstone did not have the incentive to appeal the mootness issue vigorously in his own suit against Amoco, particularly when Amoco's suit against him was still pending, Amoco should not be penalized for Johnstone's lack or original incentive. The issue was critical both to his own case and in Amoco's case, cases that involved more than small or nominal damages. See Parklane Hosiery, 439 U.S. at 330. The incentive that now impels Johnstone to litigate the same issue with the same party comes too late.

The litigation of the first case developed in a relatively short period of time so as to require attention, thought, and action by Johnstone. If he thought the timing was prejudicial he should have so informed the court and sought an extension. If the court denied his motion, Johnstone would have had

another issue to raise in the appeal which he abandoned. Johnstone failed to make any unfairness argument in the district court in opposition to the court's application of collateral estoppel, an argument he raises here, but in any event we see no prejudice to Johnstone for which he was not responsible.

In our view all of the requirements for the application of collateral estoppel were met. The issue of the propriety of the termination or nonrenewal of the lease already had been adequately resolved. There was nothing left for Judge Noland to do except enter judgment for Amoco, which he did, and which we must affirm.

Each party shall bear his or its own costs.

AFFIRMED.

A true Copy:
Teste:

/s/
Clerk of the United States
Court of Appeals for the
Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 7, 1988

Before

Hon. Harlington Wood, Jr., Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. John W. Reynolds, Senior District Judge

AMOCO OIL COMPANY, Plaintiff-Appellee,	) Appeal from the United States District Court for the
No. 87-2916 vs.	) Southern District of Indiana, Indianapolis
DONALD V. JOHNSTONE, Defendant-Appellant.	) Division. No. 86C642 James E. Noland, Jud.

The cause was heard on the Defendant-Appellant's Petition for Rehearing.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that said Petition be, and the same is hereby DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMOCO OIL COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. IP86-642-C
	)	
DONALD V. JOHNSTONE,	)	
	)	
Defendant.	)	

ORDER

This cause came before the Court for trial on August 27, 1987. The Court, having heard the evidence presented and the arguments of counsel, and having found at the close of the trial that the law is with the plaintiff and against the defendant on both the plaintiff's complaint and the defendant's counterclaim, and having entered its Memorandum Decision herein, and being duly advised in the premises, now makes this written entry.

IT IS HEREBY ORDERED that judgment be entered in favor of the plaintiff on the plaintiff's complaint.

IT IS FURTHER ORDERED that judgment be entered in favor of the plaintiff on the defendant's counterclaim.

IT IS SO ORDERED.

DATED this 9th day of November, 1987.

James E. Noland,
U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMOCO OIL COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. IP 86-642-C
	)	
DONALD V. JOHNSTONE,	)	
	)	
Defendant.	)	

MEMORANDUM DECISION

The plaintiff Amoco Oil Company brought this action seeking a declaratory judgment that the plaintiff Amoco had properly terminated and/or nonrenewed a lease with the defendant Donald V. Johnstone pertaining to an Amoco station, and requesting that the Court order the defendant Johnstone to deliver possession of the Amoco station to Amoco. Amoco alleges that it offered to sell its interest in the Amoco station to Johnstone, and that despite negotiations by both sides, no contract for sale of the station by Amoco to Johnstone was ever formed. Johnstone, on the other hand,

believed that a contract was formed. He was granted leave of court to amend his pleadings to include a counterclaim asking for specific performance directing Amoco to sell the station to Johnstone. Jurisdiction of the Court is found under the Petroleum Marketing Practices Act, 15 U.S.C. §2801 et seq. ("PMPA"); the Declaratory Judgment Act, 28 U.S.C §1332. Trial of this action was to the Court on August 27, 1987. This Memorandum Decision is entered in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, which allows findings of fact and conclusions of law to appear in a memorandum of decision filed by the Court.

I.

The facts established by the evidence presented by the parties are as follows. Amoco leases certain real estate at 86th Street and Westfield Boulevard in the northeast corner of such intersection known as 8601 Westfield Boulevard, Indianapolis, Indiana. Amoco improved such location as an Amoco gasoline

service station and subleased such station to the defendant Johnstone pursuant to a written lease having a term from March 1, 1983 until February 28, 1986. Amoco's lease of the real estate will sometimes be referred to as the "Ground Lease" and the lease to Johnstone will sometimes be referred to as the "Dealer Lease." The Amoco service station located at 8601 Westfield Boulevard will be referred to as the "Amoco station."

Johnstone was represented in negotiations for the possible purchase by Johnstone of Amoco's interest in the Amoco station by his attorney, Christian B. Carisch ("Carisch"). Carisch negotiated with Amoco concerning the possible purchase by Johnstone of the Amoco station. Amoco's representative for negotiations concerning the station operated by Johnstone was one of its attorneys, Marguerite McDermed ("McDermed"). The subject of the negotiations included the sale of interests in real estate. By letter dated November 18,

1985, Amoco offered to sell to Johnstone its interest in the Amoco station and under the ground lease for approximately $112,000. Such offer originally required a written acceptance within 90 days, but the parties agreed to extend the time of such offer through March 31, 1986.

On March 24, 1986 Carisch had a conversation with McDermed in which he indicated that Johnstone was "interested" in purchasing Amoco's interest in the real estate for $68,000 together with the actual cost of refurbishing the underground storage tanks. At the time the parties did not agree on all the terms and conditions of the purchase of Amoco's interest in the real estate involved in the Amoco station. The unresolved items were:

a. The parties agreed on the amount of the earnest money deposit, $5,000.00, but never did agree upon the terms of an earnest money clause. The offer

of Amoco on November 18, 1985 did not include any requirement of earnest money, but the parties agreed to add this to the written documents.

b. Preparation by Amoco of closing documents and the review thereof by Carisch on behalf of Johnstone.

c. Whether the underground storage tanks at the Amoco station required refurbishment or whether such tanks would be removed.

Amoco in turn prepared closing documents and by cover letter of April 4, 1986 sent them to Carisch. The documents included a proposed "Real Estate Improvement Sales Contract" and a proposed "Assignment of Lease," which proposed to assign all of Amoco's right, title and interest in and to the Ground Lease to Johnstone.

In the April 4, 1986 letter from Amoco to Carisch, Amoco asked Johnstone's "intention"

with respect to a separate case in litigation between him and Amoco. Amoco commented that it seemed "appropriate at this time to dispose of this case. . . ."[1] None of the proposed closing documents sent by Amoco referred to this separate litigation, and Amoco did not state that a settlement of the separate litigation was any condition or requirement to any sale of its interest in the Amoco station to Johnstone.

The parties, through their representatives, further negotiated about the possible sale in a telephone conversation on April 25, 1986. Shortly before this telephone conference, Carisch learned of an appraisal of

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[1]The case to which Amoco made reference was determined to be an action styled "Donald V. Johnstone, Plaintiff v. Amoco Oil Company, Defendant, cause no. IP 84-1518-C," filed in this District Court. Judge Dillin entered his findings of fact and conclusions of law in that case on March 18, 1987, which was prior to the date of this trial. The effect of that judgment on this case will be discussed in section II herein.

Amoco's improvements on the real estate showing that the improvements of Amoco had a value of $33,000. In the conversation on April 25, 1986, Carisch indicated that his client, Johnstone, had changed his mind about purchasing Amoco's interest in the real estate for $68,000 together with the actual cost of refurbishing the underground storage tanks and offered, on behalf of Johnstone, to purchase Amoco's interest in the real estate for $33,000 plus the actual cost of refurbishing the tanks. In that April 25, 1986 conference, Carisch stated that he was not involved in the MMP case and had no authority to discuss it.

McDermed and Carisch negotiated further concerning the possible sale on April 28, 1986. At that time, Carisch indicated that he did have authority to discuss the MMP case and that Johnstone would dismiss the MMP case if the purchase price for the Amoco station were reduce by $7,000 or $8,000. Carisch, on behalf

of Johnstone, offered to dismiss the MMP case and to purchase Amoco's interest in the Amoco station for $25,000 plus the actual coast of refurbishing tanks. Carisch further offered that, if there were no dismissal of the MMP case, Johnstone again offered to purchase Amoco's interest in the Amoco station for $33,000 plus the actual cost of refurbishing the tanks, as he had done in the April 25, 1986 telephone conference. Such offers on behalf of Johnstone were rejected by McDermed, on behalf of Amoco.

By letter dated April 28, 1986, Carisch proposed two additions and/or changes in the Real Estate Improvement Sales Contract, one of the documents submitted by Amoco to Carisch with the April 4, 1986 letter. The first change involved the second paragraph of the Real Estate Improvement Sales Contract. By this proposed change, Carisch rejected the "Assignment of Lease" proposed by Amoco with its April 4, 1986 letter. The testimony is

undisputed that the terms of the assignment in the second paragraph as proposed by Carisch's letter of April 25 were never agreed upon.

The second change related to the terms and conditions of an earnest money clause. While the parties agreed on the amount of earnest money, $5,000, it is undisputed that the parties never did agree upon the terms of the earnest money clause proposed by Carisch in the April 28, 1986 letter.

By its letter of May 9, 1986 from Amoco to Johnstone, Amoco offered to sell on the basis of the documents submitted to Carisch on April 4, 1986. Acceptance of such offer required signing the sales contract submitted on April 4, 1986 and submission of the earnest money deposit of $5,000 on or before May 15, 1986. While Johnstone did submit an earnest money check on or before that date, Johnstone did not then and has never signed the Real Estate Improvement Sales Contract or any of the other documents proposed by Amoco in its letter of

April 4, 1986. The May 9, 1986 letter withdrew any consideration of the MMP litigation from the negotiations.

There was never an agreement reached between Amoco and Johnstone, through any offer made by Amoco, on all the essential terms and conditions of any contract for sale of Amoco's interest in the Amoco station.

Further, with regard to the Defendant's counterclaim, there was never an agreement reached between Amoco and Johnstone, through any offer made by Johnstone, on all the essential terms and conditions of any contract for sale of Amoco's interest in the Amoco station. In count I of Johnstone's counterclaim, paragraph 12, Johnstone alleges and admits that Johnstone made an offer to purchase Amoco's interest. In paragraph 13 of count I, Johnstone alleges that Amoco "accepted" this offer between March 26, 1986 and April 4, 1986. The evidence is without dispute that there were no written or oral

communications between Amoco and Johnstone or Carisch in that period of time so that Amoco could not have accepted such alleged offer of Johnstone during such time period. Johnstone does not contend that the April 4, 1986 letter was an acceptance of Johnstone's alleged counter-offer. In addition, Johnstone failed to prove any damages in connection with his counterclaim. The only evidence on the subject showed that, to acquire the interest of Amoco and the interest of the landowner at the site of the Amoco station would cost $175,000 to exercise the option and $112,000 to purchase Amoco's interest, for a total of $287,000. The evidence showed that Johnstone secured an appraisal which showed the fair market value of all interests in the subject property was $233,000, so that if Johnstone acquired all interest in the real estate, he would sustain a loss of approximately $54,000.

II.

A. Issue Preclusion

In the suit between these parties decided by Judge Dillin, Johnstone alleged that a franchise agreement provision, specifically a Meter Marketing Plan deposit provision, was void. Amoco contended that, with respect to the Amoco station on Westfield Boulevard, the relationship between Johnstone and Amoco at such station had been terminated or nonrenewed pursuant to the terms of the PMPA. Following the trial of such action, the Court entered a Final Judgment for Amoco and found that, with respect to the Amoco station at Westfield Boulevard, the issues as to the validity of the Meter Marketing Plan were moot, because the franchise relationship between Amoco and Johnstone at the Amoco station had been terminated or nonrenewed pursuant to the PMPA

and Amoco's letter of November 18, 1985.[2]

On the day this trial was held, on motion of the plaintiff, after hearing arguments of counsel and reviewing the record, the Court

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[2]In that case, the following findings of fact were made:

"1. On February 28, 1983, Amoco and Johnstone executed a Dealer Supply Agreement (DSA) and accompanying Meter Marketing Plan Rider (MMP) for each of two service stations."

"2. One such station is located at 8601 Westfield Boulevard, Indianapolis, Indiana, S.S. No. 10071-46 ("Nora Station"). The DSA and MMP for the Nora Station expired pursuant to the terms of the agreements on February 28, 1986."

"3. By letter dated November 15, 1985, Amoco gave Johnstone notice of its intention to terminate or nonrenew the parties' relationship with respect to the operation of the Nora Station in accordance with the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq."

In addition, the following conclusion of law was made:

"1. All issues involving the validity of the provisions of the Meter Marketing Plan (MMP) Rider for the Nora Station are moot."

ruled that under the doctrine of issue preclusion, also known as collateral estoppel, the parties were precluded and estopped from re-litigating the issue of whether Amoco properly terminated its relationship with Johnstone in accordance with the provisions of the PMPA.

Res judicata is a broad and sweeping term which includes two doctrines concerning the preclusion effect of a prior adjudication. The first doctrine is claim preclusion or true res judicata. It states that once a judgment is rendered, no further relief may be accorded the same parties on the same "claim" or "cause of action." The second doctrine is issue preclusion, also known as collateral estoppel. Such doctrine prevents the re-litigation of issues and facts actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. Kaspar Wire Works, Inc. v. Leco Engineering & Mach., 575 F.2d 530, 535-536 (5th Cir. 1978), as cited

in Wright & Miller, Federal Practice & Procedure § 4402 (1981).

The United States Supreme Court has stated:

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel . . . . Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case . . . . [c]ollateral estoppel relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication. (Citation omitted.)

Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 414-415, 66 L. Ed.2d 308 (1980). Further, the Seventh Circuit has ruled that the application of collateral estoppel requires four elements:

1. The party against whom the estoppel is asserted was a party to the prior adjudication.
2. The issues which form the basis of the estoppel were actually litigated and

decided on the merits.

3. The resolution of the particular issues was necessary to the court's judgment.

4. Those issues are identical to issues raised in the subsequent suit.

County of Cook v. Midcon Corp., 773 F.2d 892, 898-899 (7th Cir. 1985).

Using the above standards, this Court found that the parties in this case were precluded from re-litigating the issue of whether Amoco properly terminated its relationship with Johnstone regarding the Westfield station. The record indicates that a full and fair opportunity to litigate the issue existed in the prior described litigation, and that the issue was litigated and decided on the merits. The significance of the conclusion of law in the prior litigation is that the relationship between the parties had ended. This necessarily includes a determination, as stated in the findings of fact, that Amoco

properly terminated its association with Johnstone regarding the service station in question. Because the issue and the parties are identical, and because a decision on the merits which was essential to the judgment was rendered, this Court held as a matter of law that the parties to this suit were precluded from relitigating this issue.

B. Contract Analysis

Although Amoco and Johnstone negotiated about a possible sale, the parties never reached a written or oral agreement for the sale of Amoco's interest in the Amoco station to Johnstone. Johnstone did not accept any offer tendered by Amoco, and Amoco did not accept any offer tendered by Johnstone. Regarding the testimony of the witnesses Carisch and McDermed on the issues involved, the Court finds the testimony of McDermed to be more credible. This Court finds as a matter of law that because there was no acceptance of an offer and no agreement on the essential terms

involved in this negotiation, no contract was ever formed.

Further, the parties at all times contemplated that any sale of Amoco's interest in the Amoco station would be pursuant to written agreement signed by both parties. The Amoco offer of November 18, 1985 required an acceptance in writing. Carisch's letter of March 26, 1986 contemplated written documents which would be reviewed and signed by his client. Amoco's letter of April 4, 1986 sent proposed written documents for review by Carisch and signature for Johnstone. Carisch's letter of April 28, 1986 drafts proposed changes in the written agreements. Amoco's letter of May 9, 1986 required a signed agreement. The parties never completed the negotiation of written agreements and never signed any written agreements. Because the possible sale of Amoco's interest in the Amoco station involved the right to possession of the real estate, the right to use the buildings and

driveways, the ownership of improvements and fixtures, and an option to purchase the real estate, interests in the real estate were involved so that the Indiana Statute of Frauds was applicable. Even if the parties had reached an oral agreement as to the sale, such agreement would be unenforceable under the Indiana Statute of Frauds, I.C. §32-2-1-1.

Amoco has demonstrated that it is entitled to the relief prayed for in its complaint. Johnstone has failed to prove that he is entitled to specific performance or is otherwise entitled to damages. This Court holds that the law is with Amoco and against Johnstone on both the plaintiff's complaint and the defendant's counterclaim. Accordingly, judgment shall be entered for Amoco and against Johnstone on both the plaintiff's complaint and the defendant's counterclaim. The defendant shall be ordered to deliver possession of the Amoco station to Amoco.

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DONALD V. JOHNSTONE, Plaintiff,	)	
vs.	)	No. IP84-1518-C
AMOCO OIL COMPANY, Defendant.	)	

JUDGMENT

The Court having this day filed its findings of fact and conclusions of law in the above captioned matter in the following words and figures to-wit: now therefore

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by his complaint and said complaint is hereby dismissed.

IT IS FURTHER CONSIDERED AND ADJUDGED that plaintiff pay the costs of this action.

Dated this 18th day of March, 1987.

/s/
S. Hugh Dillin, Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DONALD V. JOHNSTONE, Plaintiff,	)	
vs.	)	NO. IP84-1518-C
AMOCO OIL COMPANY, Defendant.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Heretofore, the Court heard the evidence in this case, and now being fully advised enters its findings of fact and conclusions of law as follows:

Findings of Fact

1. On February 28, 1983, Amoco Oil Company ("Amoco") and Donald V. Johnstone ("Johnstone") executed a Dealer Supply Agreement (DSA) and accompanying Meter Marketing Plan Rider (MMP) for each of two service stations.

2. One such station is located at 8601 Westfield Boulevard, Indianapolis, Indiana,

S.S. No. 10071-46 ("Nora Station"). The DSA and MMP for the Nora Station expired pursuant to the terms of the agreements on February 28, 1986.

3. By letter dated November 15, 1985, Amoco gave Johnstone notice of its intention to terminate or nonrenew the parties, relationship with respect to the operation of the Nora Station in accordance with the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq.

4. The second station is located at 9602 North Meridian Street, Indianapolis, Indiana, S.S. No. 10044-46 ("Belle Meade Station"). The DSA and MMP are still in effect as to it.

5. The DSA and MMP grant Johnstone the right to engage in the business of dispensing goods or services under a marketing plan or system prescribed in substantial part by Amoco.

6. The DSA and MMP set forth the parties' agreement with respect to Amoco's delivery and sale of petroleum products to

Johnstone and the manner in which Johnstone pays for the products delivered. The MMP allows Johnstone to defer payment for gasoline delivered by Amoco until after the product is pumped and sold to consumers. Under the MMP, Amoco delivers petroleum products into Johnstone's 28,000 gallon capacity storage tanks, and continues to own such products until Johnstone sells them to the public. Thereafter, at least once per week, Johnstone pays Amoco therefor.

7. For the benefit of deferred payment and to protect Amoco from nonpayment, Johnstone is required to make a security deposit with Amoco. The MMP provides that the amount of the security deposit may be increased or decreased at any time in consequence of changing values of the inventory upon ten day's prior written notice to Johnstone.

8. The security deposit for the Belle Meade Station, in the amount of $1,329.00, remained unchanged from November 4, 1977 to

December, 1983.

9. In December, 1983, Johnstone was notified that this security deposit was being increased to reflect the increased value of inventory in his possession. The other Amoco dealers in the Indianapolis area who were being supplied with products pursuant to an MMP were also advised that their security deposits were being adjusted in the same manner.

10. The increase in the security deposit was calculated by dividing the annual gallonage delivered to Johnstone by fifty-two, the number of weeks in a year, and the number of times Johnstone elected to transmit MMP reports and payments to Amoco per week. That figure was then multiplied by the average price of the product sold to Johnstone.

11. At the time the security amount was increased, Johnstone transmitted MMP reports and payments to Amoco once per week.

12. Under the formula, the increased deposit requested in December, 1983 based upon

one report and payment per week was $16,733.00. The amount could be decreased as follows:

2 reports per week - $8,366,50

3 reports per week - $5,577.66

4 reports per week - $4,183.25

5 reports per week - $3,346.60

13. The requested increase in the amount of the security deposit was made to reflect the increased value of the inventory of Johnstone's possession pursuant to the terms of the MMP, Paragraph 6.

14. Johnstone was given the option of continuing to received deliveries under the MMP without advance payment for Amoco product by depositing the appropriate increased amount for security according to this choice of reporting periods per week. He also had the option of purchasing product under the direct delivery plan which provides for payment on a cash-on-delivery basis, eliminating the requirement of any security deposit.

15. Johnstone had the financial ability to pay the requested amount of $16,733.00, based on one report per week. Johnstone's election to transmit reports and payments more frequently or to purchase product under the direct delivery plan would not have significantly impaired the operation of the service station.

Conclusions of Law

1. All issues involving the validity of the provisions of the Meter Market Plan (MMP) Rider for the Nora Station are moot.

2. The security deposit provision of the Meter Marketing Plan (MMP) Rider does not violate Ind. Code § 23-2-2.7-1(3).

3. The MMP Rider is itself an agreement in writing, signed by Johnstone, agreeing that the amount of the MMP deposit may be changed in accordance with the standards specified in Paragraph 6 of the MMP Rider. So long as the security deposit is changed in accordance with

such standards, Amoco has the same right to make such changes as it has the right to change the price of its products as set out in the DSA.

4. Plaintiff does not allege or contend that the December, 1983 increase in the MMP deposit was a breach of the MMP Rider, but contends solely that Paragraph 6 of the MMP Rider is invalid under the Indiana Deceptive Franchise Practices Act, Ind. Code § 23-2-2.7-1(3). We hold to the contrary.

5. Even if the provision were to be construed as allowing a unilateral modification, the provision does not allow a substantial modification of the parties' agreement in violation of Ind. Code §23-2-2.7-1(3), because:

(a) The increase in the security deposit was not a discriminatory modification that significantly hindered Johnstone's ability to compete; and

(b) The increase in security deposit did not substantially impair Johnstone's ability to operate his business.

6. Judgment will be entered in accordance herewith.

Dated this 18th day of March, 1987.

/s/
S. Hugh Dillin, Judge

Supreme Court, U.S.
FILED
APR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1468 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

DONALD V. JOHNSTONE, Petitioner,

v.

AMOCO OIL COMPANY, Respondent

ON WRIT OF CERTIORARI TO TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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April 6, 1989

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QUESTIONS RESTATED

1. Should the Petition be granted to review the holding of the Court of Appeals that the District Court correctly applied the doctrine of collateral estoppel where no new or different principles of collateral estoppel were applied or announced?

2. Should the Petition be granted to review an issue relating to the doctrine of collateral estoppel which was not raised in the District Court, was not raised in briefing or oral argument in the Court of Appeals, but was first raised in the Court of Appeals on rehearing?

3. Should the Petition be granted to review the holding of the Court of Appeals that the actual basis for the finding by the District Court in the prior case was necessary to the judgment entered by the District Court in the prior case, rather than some possible alternative basis not even considered?

STATEMENT REQUIRED BY RULE 28.1

Respondent Amoco Oil Company's parent corporations are Amoco Holding Company and Amoco Corporation. Amoco Oil Company's subsidiaries (excepting wholly-owned subsidiaries) and affiliates are Atlas Supply Company, Fertilizers of Trinidad & Tobago Limited, ACM Services, Inc. and Amoco International Finance Corporation.

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No. 88-1468

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

DONALD V. JOHNSTONE, Petitioner,

v.

AMOCO OIL COMPANY, Respondent

ON WRIT OF CERTIORARI TO TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondent Amoco Oil Company ("Amoco") markets gasoline petroleum products. Amoco and petitioner Donald V. Johnstone ("Johnstone") were parties to a Lease, Dealer Supply Agreement and Meter Marketing Plan Rider ("MMP Rider") thereto, and other agreements relating to the Amoco Service Station located at 8601 Westfield Boulevard, Indianapolis, Indiana ("Nora Station") dated February 28, 1983. The term of the Lease and other agreements was from March 1, 1983 to February 28, 1986.

On October 11, 1984, Johnstone initiated an action against Amoco entitled "Donald V. Johnstone, plaintiffs v. Amoco Oil Company, defendant," in the United States District Court for the

Southern District of Indiana, Indianapolis Division, Cause No. IP 84-1518-C ("First Case"). In the First Case, Johnstone alleged that certain provisions in the MMP Riders to the dealer supply agreements between Johnstone and Amoco with respect to the Nora Station and another service station operated by Johnstone ("Belle Meade Station") violated the Indiana Deceptive Franchise Practices Act. Johnstone requested the Court to declare such provisions invalid and to reform each of the MMP Riders.

Amoco asserted that all issues concerning the validity of the MMP Rider for the Nora Station were Moot, because the franchise relationship between Amoco and Johnstone, which included the MMP Rider with respect to the Nora Station, had been terminated or non-renewed by

Amoco in accordance with the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §2801 et seq. ("PMPA"). On November 18, 1985, Amoco sent to Johnstone a notice terminating or non-renewing the Lease and any attendant franchise relationship between Amoco and Johnstone at the Nora Station effective February 28, 1986, the date of the expiration of the Lease and agreements. The notice included an offer to sell Johnstone Amoco's interest in the Nora Station and to assign to Johnstone Amoco's interest in the underlying ground lease.

On March 18, 1987, the District Court entered judgment in favor of Amoco and made the following pertinent findings of fact and conclusions of law:

Findings Of Fact

1. On February 28, 1983, Amoco Oil Company ("Amoco") and Donald V. Johnstone ("Johnstone") executed a Dealer Supply Agreement (DSA) and accompanying Meter Marketing Plan Rider (MMP) for each of two service stations.

2. One such station is located at 8601 Westfield Boulevard, Indianapolis, Indiana, S.S. No. 10071-46 ("Nora Station"). The DSA and MMP for the Nora Station expired pursuant to the terms of the agreements on February 28, 1986.

3. By letter dated November [18], 1985, Amoco gave Johnstone notice of its intention to terminate or nonrenew the parties' relationship with respect to the operation of the Nora Station in accordance with the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §2801 et seq.

* * *

Conclusions Of Law

1. All issues involving the validity of the provisions of the Meter Marketing Plan (MMP) Rider for the Nora Station are moot.

* * *

App., pp. 39a, 40a, and 44a.

The first action clearly involved an issue relating to the PMPA -- whether Amoco properly terminated its relationship with Johnstone with respect to the operation of the Nora Station in accordance with the provisions of the PMPA.

Johnstone's appeal of the Judgment in the First Case was dismissed on Johnstone's motion on May 21, 1987.

On May 19, 1986, Amoco filed this action (sometimes referred to as the "Second Case") against Johnstone seeking to eject Johnstone from the Nora Station. Johnstone filed a counter-claim in which he sought an order "declaring the Lease and other terms of the franchise relationship between the parties renewed as of March 1, 1986, under the same

terms and conditions set forth previously in writing between the parties . . .", based upon allegations that Amoco failed to properly terminate its relationship with Johnstone at the Nora Station pursuant to the PMPA.

The District Court correctly held in the Second Action that the doctrine of collateral estoppel precluded the relitigation of the issue of proper termination. Judgment in favor of Amoco was entered on November 9, 1987, and on September 14, 1988, the Seventh Circuit Court of Appeals affirmed.

REASONS FOR DENYING THE PETITION

I. SEVENTH CIRCUIT'S CORRECT APPLICATION OF DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT SHIFT BURDEN OF PROOF UNDER PMPA.

The issue presented to the Seventh Circuit Court of Appeals was whether the District Court properly applied the doctrine of collateral estoppel to preclude the relitigation of the issue of whether Amoco terminated its franchise relationship with Johnstone in accordance with the PMPA. The issue presented was not whether Amoco had the burden of proving proper termination in the First Case. Thus, the Seventh Circuit's Opinion is based upon principles relating to the doctrine of collateral estoppel, not the PMPA.

Johnstone's argument that the Seventh Circuit's Opinion shifts the burden of proving compliance with the

PMPA from the franchisor to the franchisee is nothing more than an attempt to manufacture a conflict among the circuits in construing the Act. The Seventh Circuit did not decide, nor does the decision even discuss or refer to, any issue relating to the burden of proof under the PMPA. The decision cannot be reasonably construed to have decided any issue on burden of proof or to conflict with any decision on the burden of proof.

The Seventh Circuit's Opinion does give the basis for its holding (on the issue which was presented on appeal) that the District Court correctly applied the doctrine of collateral estoppel.

Under the PMPA, a franchisor may terminate or nonrenew a franchise only

upon grounds specified in the Act and in accordance with the notice provisions of the Act. 15 U.S.C. §2802(a) and (b). Under 15 U.S.C. §2802(b)(3)(D)(i), a ground for nonrenewal is:

> (IV) that the renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee . . . .

Amoco terminated or non-renewed its relationship with Johnstone and gave notice of its intention to so termination or non-renew by letter dated November 18, 1985. Amoco's letter of November 18, 1985, stated:

> Please refer to your lease from this company, Form 26-342, dated February 28, 1983, covering the above identified service station premises such lease being identified therein as Lease No. B-20066-2.

> Amoco Oil Company does hereby terminate and nonrenew said Lease and does hereby terminate and nonrenew any attendant franchise relationship effective February 28, 1986. All agreements relating to the Lease and franchise relationship are also hereby terminated and nonrenewed as of said effective date.
>
> In compliance with the provisions of the Petroleum Marketing Practices Act you are hereby notified that the grounds for the above action are that Amoco Oil Company has evaluated the future profitability to Amoco of its franchise relationship with you using its standard and usual methods. Amoco Oil Company has made the determination in good faith and in the normal course of business that renewal of the franchise relationship is likely to be uneconomical to Amoco despite any reasonable changes or reasonable additions to provisions of the franchise which may be acceptable to the franchisee. . . .

Amoco's letter of November 18, 1985 also included an offer to sell Johnstone all of Amoco's interest in the Nora Station pursuant to the PMPA. 15 U.S.C. §2802(b)(3)(D)(iii)(I).

Amoco successfully asserted in the First Case that a judgment declaring a provision in the MMP Rider for the Nora Station as invalid under the Indiana Deceptive Franchise Practices Act would constitute the giving of an advisory opinion, because the relationship of the parties had been terminated in accordance with the PMPA. Because Amoco properly terminated or nonrenewed its relationship with Johnstone as of February 28, 1986, there was no longer an existing agreement subject to reformation. Thus, issues involving such rider were moot.

The Court's finding that Amoco "gave Johnstone notice of its intention to terminate or nonrenew the parties' relationship with respect to the operation of the Nora Station in

accordance with the provisions of the Petroleum Marketing Practices Act . . ." (emphasis added) and its conclusion that the issues involving the validity of the provisions of the MMP Rider for the Nora Station were moot necessarily were based upon the fact that Amoco's termination or nonrenewal was proper under the PMPA. If not properly terminated "in accordance with the provisions of the" PMPA, as found in the MMP Case, the relationship would not have been terminated and the issue would not have been moot!

The Seventh Circuit stated that at Johnstone's argument on appeal in the Second Case as follows:

> Johnstone argues that the application of collateral estoppel unjustly denies him the opportunity to dispute Amoco's stated grounds for non-renewal or termination, and the question of whether Amoco's offer to

> sell was bona fide. It is Johnstone's position that the District Court in the first case did not hear evidence, nor otherwise consider the merits of Amoco's compliance with the PMPA for the Nora Station. Johnstone also argues that the case cannot be construed to suggest such an adjudication.

App., pp. 10a-11a.

In rejecting Johnstone's argument, the Seventh Circuit quoted its decision in Frye v. United Steel Worker's of America, 767 F.2d 1216, 1222 (7th Cir.), cert. denied, 474 U.S. 1007 (1985):

> [e]ven if there were other facts that could have been presented at [trial] the fact that they were not brought to the [court's] attention would not argue against the application of collateral estoppel, as long as there had been an equal incentive to litigate the issue, and if there were no other factors making estoppel unjust.

App., p. 12a.

Applying its analysis in Frye, the Seventh Circuit held:

> It must be remembered that in the first suit between these parties Johnstone sued Amoco, seeking to reform certain aspects of their franchise arrangements. When the Nora Station lease expired by its own terms and bargaining in accordance with the PMPA produced no contract of sale, the Nora Station reverted to Amoco, and the controversy was over. Johnstone had no further legal interest in the Nora Station, and it would therefore be futile to try to reform a franchise that was no longer in existence. If Johnstone, as he claims, had valid defenses to any termination by Amoco the first case provided him with the time and place to offer those defenses. The issue of the Nora Station franchise's viability was put in issue by Amoco. The court then found the station's status had been resolved and all was moot. There was little more that Judge Dillin could say about the matter if the defendant held back and did not deny mootness nor offer any of the defenses he now claims to have had to demonstrate that the case was not moot because the PMPA had not been properly complied with by Amoco.

App., pp. 12a-13a.

The Court of Appeals' use of the term "defense"[1/] clearly was not referring to Affirmative Defenses as provided in Rule 8(c), Federal Rules of Civil Procedure, for which Johnstone would have the burden of proof. The term "defense" was plainly meant by the Court of Appeals to mean legal responses or arguments or evidence or reasons to oppose or to contest Amoco's contention. As in any action, a party responds to a contention of the party bearing the burden of proof by presenting evidence or legal arguments to attempt to defeat

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1/ The term "defense" may have been suggested to the Court by a section in Johnstone's Appellant's Brief entitled "Johnstone's Defenses and Claims Under the PMPA". Appellant's Brief, p. 15.

the contention or by challenging the sufficiency of the evidence to sustain the burden of proof. The Court of Appeals simply held that the place to challenge the sufficiency of the evidence of proper termination or challenge Amoco's claim of mootness was in the First Case where the issue was tried. Such an interpretation of the Opinion is clear based upon the context in which the term "defense" was used:

> It was up to Johnstone either to show why his claim was not moot or suffer the loss of that part of his own lawsuit as to the Nora Station. If he had for some reason been prevented from making his defense in that trial court he could have raised that issue on appeal. He did neither and voluntarily dismissed his appeal. We cannot now retry that part of Johnstone's first lawsuit in this second suit of Amoco. It appears that Johnstone may have mispreceived what was happening in the first suit and what its effect could be, but it should have been obvious. If Johnstone did not have the incentive to appeal the

> mootness issue vigorously in his own suit against Amoco, particularly when Amoco's suit against him was still pending, Amoco should not be penalized for Johnstone's lack of original incentive. The issue was critical both to his own case and in Amoco's case, cases that involved more than small or nominal damages. See Parklane Hosiery, 439 U.S. at 330. The incentive that now impels Johnstone to litigate the same issue with the same party comes too late . . . .
>
> In our view all of the requirements for the application of collateral estoppel were met. The issue of the propriety of the termination or nonrenewal of the lease already had been adequately resolved. There was nothing left for Judge Noland to do except enter judgment for Amoco, which he did, and which we must affirm.

App., pp. 13a-15a.

It is obvious, and undisputed, that Amoco asserted and had the burden of proving mootness and that mootness was dependent on proof that the relationship had been terminated or non-renewed in accordance with the PMPA. There is no

indication that the Court somehow felt Amoco did not have the burden of proof on this issue (which in any event would be an issue to be decided in the First Case). The Court of Appeals was talking about defending this contention on which Amoco had the burden of proof and whether Johnstone "held back" (App., p. 13a) or, in other words, failed to challenge or defend or contest this contention made by Amoco.

Nowhere in the Seventh Circuit's Opinion does the Court discuss or even allude to the burden of proof in actions under the PMPA. That fact is not surprising when it is considered that the argument to which the Court was responding was not who had the burden of proving compliance with the PMPA but rather Johnstone's argument that the

issue was not actually litigated in the First Case.

The Seventh Circuit's decision clearly does not conflict, nor could it be construed as conflicting, with the Eleventh Circuit's decision in Clinkscales v. Chevron U.S.A., Inc., 831 F.2d 1565 (11th Cir. 1987) or the Tenth Circuit's opinion in Ewing v. Amoco Oil Company, 823 F.2d 1432 (10th Cir. 1987).

Contrary to Johnstone's assertion, the Seventh Circuit's decision does not "set a confusing precedent". The decision is clear. The Seventh Circuit held that Johnstone should have raised his argument concerning the insufficiency of the evidence to support the finding of proper termination in the First Case.

Moreover, the burden of proof on the issue of proper termination under the PMPA did not shift from Amoco to Johnstone. Amoco clearly asserted the issue of proper termination in the First Case as a defense to Johnstone's request for reformation of the MMP Rider. Amoco assumed the burden of proving proper termination in the First Case, and the District Court found that Amoco met its burden. Again, Johnstone's contention that Amoco failed to meet its burden of proof by presenting evidence sufficient to establish the propriety of Amoco's termination or nonrenewal of Johnstone under the PMPA should have been asserted in Johnstone's appeal of the First Case. The application of collateral estoppel cannot be defeated by a claim of insufficient evidence:

> The requirement of collateral estoppel that the issue be 'actually litigated' does not require the issue be thoroughly litigated. Collateral estoppel may apply 'no matter how slight was the evidence on which a determination was made, in the first suit, of the issue to be concluded.' [citations omitted]. This requirement is generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it [citations omitted]. Under this standard, the issue in the present case was actually litigated despite the imbalance in the quantity of the evidence introduced [footnote omitted]. Any other result would permit a litigant to avoid the conclusive effect of collateral estoppel, by design or by inadvertence, by denoting as irrelevant an issue clearly raised by his oponent and by refusing to introduce evidence on the issue.

Continental Can Co. v. Marshall, 603 F.2d 590, 596 (7th Cir. 1979).

Having lost the First Case and now realizing that the result effected an important issue in this case, Johnstone is in effect saying that he simply did

not foresee that the findings and conclusions in the First Case could have preclusive effect in the Second Case and that, if he had, he would have more vigorously litigated the PMPA issues in the First Case. Any party against whom issue preclusion is applied could make precisely the same claim. As discussed by the Court in Continental Can:

> [W]henever a court considers applying the doctrine of collateral estoppel, there is always a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance at producing evidence. Without more, however, this question is not sufficient to outweigh the extremely important policy underlying the doctrine of collateral estoppel -- that litigation of issues at some point must come to an end.

Id. at 596, n. 8, quoting, James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 463 (5th Cir. 1971).

Johnstone is in the wrong case at the wrong time seeing with 20/20 hindsight things he wish he had done in the First Case which he thinks might have produced a different result.

The Seventh Circuit's Opinion is clearly correct and provides no basis for the granting of Johnstone's Petition to this Court.

II. SECTION 2805(E) ARGUMENT WAIVED.

In his Petition for Rehearing in the Court of Appeals, Johnstone for the first time argued and now argues here that the Court could not mandate the continuation of the franchise relationship under §2805(e), if Amoco established that the renewal was likely to be uneconomical dispite any reasonable changes or additions to the franchise

and compliance with the PMPA notice provisions.

This issue was first raised by Johnstone in his Petition for Rehearing filed with the Court of Appeals in this case. Johnstone did not raise the issue in his pleadings, briefs, or in the trial of this case. In fact, Johnstone's present position is a complete reversal of the positions he took in his pleadings and at trial. In his counter-claim, Johnstone sought an order "declaring the Lease and other terms of the franchise relationship between the parties renewed as of March 1, 1986, under the same terms and conditions set forth previously in writing between the parties. . . ."

Nor did Johnstone raise the issue in his brief, reply brief, or oral argument in the Court of Appeals.

The issues argued by Johnstone in the Court of Appeals were summarized in his Brief's "SUMMARY CONCLUSION" (pp. 20-21):

> 1. The PMPA compliance issues were not actually or impliedly litigated or decided on the merits in the course of the MMP case;
>
> 2. The resolution of the PMPA compliance issues were totally unnecessary to the District Court's judgment in the MMP case; [Johnstone argued that because the Court ruled against him on the Belle Meade Station MMP Rider which had the same wording as the Nora MMP Rider, the ruling on Nora was "entirely superfluous!". Appellant's Brief in Court of Appeals, p. 19. Amoco urged that significant factual differences between Belle Meade and Nora showed that the District Court would not necessarily have reached the same result on the Nora MMP Rider.]
>
> 3. There was no incentive for the parties to litigate the PMPA compliance issues during the course of the MMP case, and, indeed, Johnstone could not reasonably have foreseen that the PMPA compliance issues would even been considered with the context of the MMP case; and

4. Preclusion of the PMPA compliance issues in the course of this case is grossly unfair to Johnstone and contrary to the purposes of the collateral estoppel doctrine.

Although Johnstone now seems ready to concede that Amoco terminated the relationship on proper grounds in making his argument based upon §2805(e), he argued the contrary to the Seventh Circuit: "No finding of fact was made with regard to any factual issue necessary to determine if the notice of termination or nonrenewal was upon proper grounds or whether Amoco's offer to sell its interest in the premises to Johnstone was a 'bona fide offer' as required by the PMPA." Appellant's Brief in Court of Appeals, p. 18.

Because the issue was not raised by Johnstone before the District Court or

even in the Court of Appeals, prior to the issuance of the Opinion, any argument based on §2805(e) has been waived. E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19, 24, (1986); Hoover v. Ronwin, 466 U.S. 558, 574, n. 25 (1984).

The Opinion of the Court of Appeals does not raise, discuss or decide any PMPA issues. There is no reason for this Court to depart from its general rule of refusing to decide questions raised for the first time on appeal. See, e.g., Carlson v. Green, 446 U.S. 14, 17, n. 2 (1980).

III. SECTION 2805(e) NOT BASIS OF DECISION.

Even if Johnstone had not waived the argument, the new argument under §2805(e) would not have changed the result reached by the Court of Appeals.

That the District Court might have decided the issues in the First Case on some other basis, such as §2805(e), does not mean the actual basis for the ruling (mootness because the relationship had been terminated or non-renewed in accordance with the PMPA) was unnecessary and dictum.

The requirement of necessity means that the "disposition in the first suit was the basis for the holding with respect to the issue and not 'mere dictum.'" McLaughlin v. Bradlee, 803 F.2d 1197, 1204 (D.C. Cir. 1987). As was stated by the McLaughlin Court:

> In this case, the application of the necessity criterion 'involve[s] nothing more than a straightforward inquiry whether a particular issue was merely incidental to the first judgment.'

Id.

The District Court in the First Case expressly held that the parties' relationship had been terminated in accordance with the PMPA. The finding necessarily included a finding that Amoco complied with 15 U.S.C. §2802(b)(3)(D), including a finding that Amoco made a bona fide offer to sell its interest in the Nora Station to Johnstone. The basis for the District Court's finding and the argument presented by Amoco was that Amoco complied with 15 U.S.C. §2802(b)(3)(D). Amoco did not argue and the Court did not hold that the issues relating to the Nora Station were moot based upon an application of §2805(e).

Application of §2805(e) depends upon a finding that the relationship had not

been properly terminated[2/] and then denies equitable relief because of the provisions of §2805(e). Thus, application of §2805(e) would have required a finding in the First Case that the relationship had not been properly terminated in accordance with the PMPA. This is exactly what the Court did not find in the First (MMP) Case.

Johnstone's argument is similar to the argument that, if a case is decided on alternative grounds, preclusive effect cannot be given to one of the alternatives, because it was not necessary to the decision. Such an argument is routinely rejected by the courts. Ezagui v. Dow Chemical Corp.,

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2/ Based on §2805(e), Johnstone now argues that he "may still seek actual damages" based on an improper termination. Pet. p. 39; also see pp. 40 and 42 ¶ (c).

598 F.2d 727, 732-33 (2nd Cir. 1979); General Dynamics Corp. v. American Tel. and Tel. Co., 650 F. Supp. 1274, 1284-85 (N.D. Ill. 1986). As was stated by the Court in Ezagui: "Even 'if a court decides a case on two grounds, each is a good estoppel.'" 598 F.2d at 727, quoting, Irving National Bank v. Law, 10 F.2d 721, 724 (2nd Cir. 1926).

A simple illustration of the principle is as follows. In a routine negligence case, the Court could decide for defendant based on findings of contributory negligence, absence of negligence of defendant, or plaintiff's failure to establish proximate causation. If the Court makes specific findings of fact in favor of defendant on each of the issues, each issue is necessary to the judgment and has preclusive effect.

Further, if the Court, in fact, rules against plaintiff on the issue of contributory negligence, but declines to rule on negligence and proximate causation, the basis for the decision is that ruling, which is, accordingly, necessary. The fact that the Court might have reached the same conclusion on different grounds, e.g., no proximate cause or no negligence on the part of defendant, does not render a finding of contributory negligence unnecessary.

The basis for the District Court's decision in the First Case was that Amoco terminated or non-renewed the parties' relationship in accordance with the PMPA. Hence, the District Court did not need to and did not in fact consider §2805(e).

Johnstone's argument that "the MMP case did not involve any claims under the PMPA" (Pet., p. 42) is manifestly incorrect: Amoco asserted in the First (MMP) Case that the MMP issues were moot because the relationship had been terminated and non-renewed in accordance with the PMPA.

There are many ways in which a court can decide any case. Collateral estoppel is based upon the findings necessary to the manner in which the Court, in fact, decided the case. Collateral estoppel is not based upon some hypothetical, possible alternative that long after the fact a party argues as another possible basis for reaching the same result.

Section 2805(e) provides no basis for the granting of Johnstone's Petition.

CONCLUSION

This is an issue preclusion case, not a PMPA case!

Johnstone incorrectly attempts to wrench this case into a PMPA decision. However, the decision that the relationship between Johnstone and Amoco had been terminated in accordance with the PMPA was made in the First Case. Johnstone had his opportunity and was required to litigate those issues there. The District Court and the Court of Appeals properly applied collateral estoppel to preclude relitigation of those issues in this case.

The Court of Appeals did not discuss or decide any issues of burden proof under the PMPA. The Court decided collateral estoppel issues. Hence the purported conflict in the circuits urged by Johnstone does not exist.

The Petition has failed to show any reasons why this Court should review any aspect of the decision. The Petition for Certiorari should be denied.

Dated: April 6, 1989.

Respectfully submitted,

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